dence addressing the effects of pesticides on salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations." *Id.* at 142a-143a. The court established a schedule under which EPA would "make effects determinations and consult, as appropriate," with NMFS regarding the effects of those ingredients on threatened and endangered salmonids. *Id.* at 145a-146a.

In July and August 2003, the district court issued orders indicating that it would grant further injunctive relief pending the completion of any required consultation. Pet. App. 88a-123a. The court held that the plaintiffs were not required to exhaust administrative remedies under FIFRA as a prerequisite to relief that would affect existing pesticide registrations. *Id.* at 91a-93a. The court stated that injunctive relief would be appropriate unless EPA's ongoing actions were shown not to jeopardize listed species, *id.* at 94a-101a, and it found that EPA had not made the requisite showing, *id.* at 102a-109a. The court further held that the evidence supported the imposition of buffer zones—*i.e.*, prohibitions on use of the relevant pesticides in defined areas contiguous to salmon-supporting waters. *Id.* at 110a-112a.

In January 2004, the district court issued its order specifying the terms of further injunctive relief. Pet. App. 20a-87a. The order addressed the 54 pesticide active ingredients for which the Coalition had established standing to sue, and it applied to salmon-supporting waters in Washington, Oregon, and California. *Id.* at 21a-24a. The court applied the injunction to ground use of the identified pesticides within 20 yards of identified waters and within 100 yards for purposes of aerial application, with various exceptions. *Id.* at 24a-31a. When EPA makes a determination that a particular pesticide

ingredient will have "no effect" on or is "not likely to adversely affect" a particular ESU, or the agency otherwise completes consultation under Section 7(a)(2), the injunction automatically terminates as to that ingredient and ESU unless NMFS has rejected or affirmatively failed to concur in any EPA "not likely to adversely affect" determination. *Id.* at 33a-34a.[2]

4. The court of appeals affirmed. Pet. App. 1a-19a. The court held that the requirements of Section 7(a)(2) of the ESA apply to the ongoing registration of pesticides under FIFRA. *Id.* at 11a-13a. The court further held that, because EPA retains "discretion to alter the registration of pesticides for reasons that include environmental concerns," the district court possessed authority to award injunctive relief to enforce the ESA. *Id.* at 13a-14a. The court of appeals also held that use of the administrative mechanisms for rescinding pesticide approvals under FIFRA was not a prerequisite to the district court's issuance of an injunction, *id.* at 15a-16a, and that the plaintiffs' suit was properly brought under the ESA citizen-suit provision rather than under the APA, *id.* at 16a. The court additionally concluded that the district court had "correctly assigned EPA the burden of proving that its actions were non-jeopardizing." *Id.* at 18a.

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[2] On August 5, 2004, during the pendency of the appeal in this case, NMFS and FWS promulgated joint counterpart ESA consultation regulations that provide alternative processes that EPA may use to satisfy its obligations under Section 7(a)(2) of the ESA with respect to pesticide-licensing actions taken under FIFRA. 69 Fed. Reg. 47,732. *Inter alia*, these procedures authorize EPA under certain circumstances to complete informal consultation without the need for the written concurrence of the resource agency. *Id.* at 47,761.

## ARGUMENT

Although the decision of the court of appeals is legally flawed, that decision does not squarely conflict with any decision of this Court or another court of appeals, and petitioners have not identified a compelling reason for review by this Court in the absence of such a conflict. The petition for a writ of certiorari therefore should be denied.

1. Petitioners contend (Pet. 2, 9-20) that the court of appeals erroneously declined to apply "APA standards"—in particular, the requirements that judicial review be limited to the administrative record and reflect appropriate deference to the agency's expert and technical judgments—in considering the propriety of the district court's injunctive order. Although petitioners are correct that APA standards of review apply in ESA citizen suits brought against federal defendants, nothing in the court of appeals' opinion is inconsistent with that principle.

The court of appeals understood petitioners (though not the government) to be arguing that the Coalition's suit should have been brought under the APA rather than under the ESA citizen-suit provision. In rejecting that contention, the court stated: "Because [the ESA citizen-suit provision] * * * independently authorizes a private right of action, the APA does not govern the plaintiffs' claims. Plaintiffs' suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA." Pet. App. 16a. The court of appeals did not suggest, however, that review of EPA's conduct would be less deferential or would involve consideration of a different record in an ESA citizen suit than in an APA action.

The court of appeals had no occasion to address those issues because EPA did not contend on appeal that it had made any decision with regard to ESA compliance that deserved deference under the arbitrary-or-capricious standard, and the agency did not present any administrative record to the district court. This case therefore does not provide an appropriate vehicle for the Court's consideration of any issue concerning the application of APA standards to an ESA citizen suit brought against a federal agency.

2. Under the FWS/NMFS regulations that establish a structure for consultation pursuant to Section 7(a)(2) of the ESA, an action agency need not consult with NMFS or FWS if it determines that a particular action will not affect listed species or their habitat. See p. 2, *supra*. Petitioners contend that the court of appeals erroneously treated EPA's duty to consult with NMFS as a "separately enforceable and universal obligation." Pet. 25; see Pet. 22-25. That claim lacks merit.

The courts below did not disapprove the current FWS/NMFS consultation regulations, nor did they require EPA to consult with NMFS regarding existing pesticide approvals that EPA has determined will have no effect on listed species. The district court ordered EPA to "make effects determinations and consult, *as appropriate*," for the pesticide ingredients at issue. Pet. App. 145a-146a (emphasis added). The court's injunction terminates automatically for a particular pesticide and salmon ESU upon, *inter alia*, "[a] finding by EPA made for ESA Section 7 compliance purposes that the Pesticide will have 'no effect' on the particular Salmon ESU." *Id.* at 34a. Consistent with the applicable regulatory scheme, the injunction thus clearly contemplates that, in appropriate circumstances, EPA may satisfy its

obligations under the ESA without engaging in consultation with NMFS. The court of appeals affirmed the district court's orders (*id.* at 19a), and nothing in its opinion suggests that the Ninth Circuit intended to impose a broader duty to consult than is reflected in the district court's injunction.

3. Petitioners contend (Pet. 25-27) that the court of appeals' decision is inconsistent with the balance struck by Congress between protection of listed species and the promotion of food and fiber production. Although the court of appeals' analysis of the interplay between the ESA and FIFRA is flawed, the court's application of the relevant statutory provisions to the particular facts of this case raises no issue of sufficient importance to warrant this Court's review.

Contrary to the court of appeals' understanding (Pet. App. 11a, 13a), the government does not contest the proposition that EPA's approval of pesticide-registration actions under FIFRA may be subject to the ESA as well as to FIFRA. Rather, the government argued in the court of appeals that the provisions of FIFRA are relevant in determining the precise nature of the agency's ESA obligations. Section 7(a)(2) of the ESA does not require the federal government to ensure that the continued existence of a listed species is never placed in jeopardy. Rather, Section 7(a)(2) requires each federal agency to ensure that "any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Thus, the government's duty is simply to ensure that the species is not jeopardized by actions attributable to the government itself.

Section 7(a)(2) of the ESA defines the term "agency action" to include conduct "authorized" by a federal agency. The FWS/NMFS consultation regulations provide that the term "action" includes "the granting of licenses." 50 C.F.R. 402.02. Thus, at the time an agency takes "action" by granting a license, it is obligated to analyze the anticipated future effects of the licensed conduct to ensure that the issuance of the license "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Once the "agency action" has been taken and the license issued, however, there is no continuing obligation to reexamine the issue unless and until the agency takes further "action" by, for example, cancelling, modifying, or reissuing the license. Cf. *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (same rule for National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*).

Even assuming *arguendo* that Section 1536(a)(2) could properly be construed to impose obligations on a licensing agency with respect to previously issued licenses or permits, moreover, the scope of those obligations would necessarily be limited by the scope of the agency's authority, under the provisions of law that govern the relevant licensing program, to rescind or modify the existing license. See *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). Thus, for example, if FIFRA absolutely prohibited the EPA from cancelling or modifying existing pesticide registrations, Section 7(a)(2) of the ESA would not override that prohibition. Under that hypothetical statutory scheme, the continuing existence of a pesticide registration could not constitute an "agency action" within the meaning of Section 7(a)(2) because EPA would lack ongoing "discretionary Federal

involvement or control" (50 C.F.R. 402.03) over the registration. In reality, of course, FIFRA does not prohibit the EPA from cancelling or modifying pesticide registrations, but it does significantly limit EPA's discretionary control over existing pesticide registrations by imposing substantive and procedural requirements that EPA must satisfy before taking such steps. 7 U.S.C. 136d(b)-(c).

Because Section 7(a)(2) of the ESA does not apply to agency *inaction* like that at issue here, and does not require agencies to take actions that are not authorized by their organic statutes, the district court should not have ordered injunctive relief affecting pesticide registrations in the absence of a determination that the FIFRA prerequisites for EPA to suspend or modify a pesticide registration had been met. EPA simply has no "discretionary authority" to cancel or modify pesticide registrations beyond that conferred by—and subject to the limitations of—FIFRA itself. The courts below therefore erred in overlooking those statutory constraints.

Although the court of appeals misapprehended the nature of the relationship between the dictates of FIFRA and the scope of EPA's obligations under the ESA, petitioners do not cite any other court of appeals decision that has addressed the interplay between the two statutes. In the absence of a circuit conflict, the Ninth Circuit's analysis of the relationship between FIFRA and the ESA as applied to this case does not warrant this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-395

IN THE
# Supreme Court of the United States

CROPLIFE AMERICA, *ET AL.*,

*Petitioners,*

v.

WASHINGTON TOXICS COALITION, *ET AL.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONERS' REPLY BRIEF

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# PETITIONERS' REPLY BRIEF

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1. The district court held that the Administrative Procedure Act ("APA"), "including its peculiar doctrines, does not govern plaintiffs' claims." App. 129a. The Ninth Circuit affirmed the district court's orders "in their entirety" (App. 7a) – orders that upset numerous agency decisions, over the course of decades, on the basis of perceived errors in the Endangered Species Act ("ESA") consultative process. The decision reflects a level of judicial interference with ordinary agency processes far beyond anything that the APA would allow. As shown in the Petition (at 11-20), the notion that the APA does not apply to ESA citizen suits against federal agencies conflicts with the uniform holdings and understandings of all courts of appeals that have addressed the issue, with the language of the APA, and with this Court's decisions on the proper scope of judicial review of federal agency conduct.

The foundation for the Ninth Circuit's ruling was its mistaken view that the APA does not apply if the suit is brought under a citizen suit provision, here 16 U.S.C. § 1540(g), rather than *directly* under the APA's judicial review provision, 5 U.S.C. § 704. *See* App. 16a, 128a-129a. As the Petition shows (at 8-9), that reasoning creates the disquieting anomaly, apparent here, that the very same agency action will be reviewed under deferential APA standards by one court and sustained, and later reviewed as a citizen suit in another court and rejected. The ruling's significance – and the significance of the clear conflict in the circuits – is heightened for two reasons: first, the ruling creates inconsistent agency obligations, varying by circuit, and second, the Ninth Circuit, the source of the conflict, is home to large numbers of citizen suits under the ESA and other federal environmental statutes. *See* Pet. at 14 & n.5.

2. Federal Respondents (at 9) agree with Petitioners that "APA standards of review apply in ESA citizen suits brought against federal defendants."[1] They contend,

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[1] The cases collected in the Petition (at 11-13) reflect the consensus of the circuits and support Petitioners' and Federal Respondents' view that APA standards of review do apply. Although Respondents Washington Toxics Coalition, *et al.* ("Coalition"), try to distinguish some of the cases (at 16-21), they are unable to identify any case other than this one in which a court has held that APA principles do not apply in ESA citizen suits against the federal government. Indeed, in ESA cases where the applicability of the APA has been contested, courts have (until now) consistently held that the APA applies. *See, e.g., Cabinet Mts. Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982); *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1252 (10th Cir. 1998); *Coalition for Sustainable Resources v. U.S. Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir. 2001). Additionally, the D.C. Circuit recently reiterated

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however, that "nothing in the court of appeals' opinion is inconsistent with that principle." *Id.* The Government's benign interpretation of the Ninth Circuit's ruling is facially inconsistent with that ruling:

a. Federal Respondents' position rests on the assertion that the Ninth Circuit "understood . . . petitioners to be arguing that the [plaintiffs'] suit should have been brought under the APA rather than under the ESA citizen-suit provision." Fed. Opp. at 9. In fact, that was not Petitioners' argument and that was not the Ninth Circuit's understanding. The Ninth Circuit correctly identified Petitioners' issue as whether "the district court erred by *not applying* the APA and its limited provision for judicial review of final agency action." App. 16a (emphasis added).[2] At issue before the Ninth Circuit, as that court ostensibly recognized, were the substantively important questions of the *applicability* of the APA and "peculiar" APA principles of review, not the question whether this suit *arose under* the APA. *See also* Pet. at 8-9. That the Ninth Circuit proceeded to sidestep the

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why APA principles apply in *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005).

[2] *See also* App. 62a ("intervenors contend that the case is governed by the principles of judicial review and injunctive standards" of the APA). The Ninth Circuit's statement of the issue also belies the Coalition's argument (at 12) that the first question presented in the Petition is "newly crafted." The record reflects that the same question figured prominently in Petitioners' district court briefs and was the lead argument in Petitioners' opening brief to the court of appeals. *See* App. 9a (describing intervenors' APA arguments as including the district court's failure to review on an administrative record and its failure to apply a deferential standard of review).

key question – by finding it determinative that the case arose under the ESA – does not change the significance of the ruling.

b. Federal Respondents ascribe to the Ninth Circuit the view that the district court's failure to apply the APA's "peculiar doctrines" made no difference:

> The court of appeals did not suggest . . . that review of EPA's conduct would be less deferential or would involve consideration of a different record in an ESA citizen suit than in an APA action.

Fed. Opp. at 9. But, the *absence* of such a statement simply reflects that the Ninth Circuit curtailed any APA analysis with the conclusion that the suit arose under the ESA.

c. In fact, Federal Respondents' basic objection to the result of the Ninth Circuit's analysis highlights the importance of reviewing the agency action under APA standards, rather than as a *de novo* ESA proceeding. Federal Respondents' fundamental grievance with the decision below is that the lower courts purported to review supposed failures to consult over the course of decades, giving rise to pesticide registrations, as if allowing these registrations to *remain* lawful were some type of current, continuing violation of the ESA – requiring equitable relief. Federal Respondents (at 13) postulate that § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), "does not apply to agency *inaction* like that at issue here."

However, if the Ninth Circuit had begun where it should have begun, *with the APA*, the very first question would have been, "What is the discrete 'agency action' or 'failure to act' being reviewed?" Perhaps that question would have taken the Ninth Circuit back to the various agency decisions on the registrations, or re-registrations, most of them many years

before these 26 varieties of salmon were listed under the ESA, and to the factual records before the agency at those sundry times. Here, judicial review was not conducted on the agency "record," as the APA dictates. 5 U.S.C. § 706. Or perhaps, recognizing that the APA applies, the district court or the Ninth Circuit might have thought to ask plaintiffs if they were complaining about the agency's alleged "failure to act," *see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61-64 (2004). Moreover, if the objection here was to a continuing *failure* to act, it would be difficult to show a violation of the consultation provision of ESA § 7(a)(2), which is predicated on an agency's taking some "action." 16 U.S.C. § 1536(a)(2). Certainly, the agency's reasonable position that § 7(a)(2) applies only to action, not failures to act, would have been given deference.

In sum, proceeding in a manner consistent with the APA would have given rise to a very different type of district court action and almost certainly would have had a decisive effect on the outcome. The rule that comes out of the decision means that once the Environmental Protection Agency ("EPA") takes action by registering a pesticide, EPA's "ongoing regulatory authority" is sufficient to (a) continuously trigger ESA § 7(a)(2) at whatever time a plaintiff happens to bring suit, and (b) then allow judicial review to proceed, as happened here, with no focus on a particular agency action, no administrative record for that action, no presumption of agency regularity, and no deference to agency expertise. That approach is fundamentally at odds with the APA.

d. Federal Respondents (at 10) say that, because EPA did not specifically argue that it had made any decision "with regard to ESA compliance that deserved deference under the arbitrary-and-capricious standard" and did not

present an administrative record to the district court, this case is not an "appropriate vehicle" for this Court's consideration of the APA's applicability. Federal Respondents' assertion misses the mark because those arguments were, in fact, presented to the courts below: Petitioners presented them to both courts, the district court rejected them, and the Ninth Circuit affirmed the district court's orders "in their entirety." *See* App. 6a, 16a, 129a, 136a-137a. If the courts below had not rejected APA review at the outset, there most certainly would have been an identification of the agency actions (or inactions) under review, presentation of a record, and review under the arbitrary and capricious analysis.

The decision to brush aside the APA led the courts to review allegedly "ongoing" agency conduct on a record compiled for the first time in the reviewing court. *See* App. 14a, 129a, 132a-134a. Such review is antithetical to the APA's well-recognized limitations on judicial review. *See* Pet. at 15 n.6, 20 n.8. Those limitations allow review only of specific agency actions or cognizable failures to act,[3] based

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[3] The Coalition contends (at 20) that suits challenging agency inaction are subject to different standards from suits challenging action. This argument is meritless, as it ignores this Court's recent holding in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 61-63, that the APA's judicial review provisions uniformly govern court review of agency action as well as agency "failure to act." The "ESA does not provide any consequences for failure to act within the prescribed time." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995). In the absence of express provisions in the ESA, the APA standards apply. *See* 5 U.S.C. § 559; Pet. at 15-16. *See also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1176-77 (9th Cir. 2002); *Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d at 1252 (all

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on the administrative record before the agency at the time of the alleged default, while according the agency a presumption of regularity and respecting the agency's reasonable interpretations of statutes it administers.[4] The lower courts' infidelity to these constraints conflicts with every circuit that has addressed the issue and "so far departs from the accepted and usual course of judicial proceedings" as to "call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a).

3. Federal Respondents agree with Petitioners that the Ninth Circuit's analysis of the interplay between the ESA and the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") is "flawed." Fed. Opp. at 11; *see* Pet. at 25-27. Federal Respondents further agree that "the district court should not have ordered injunctive relief affecting pesticide

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applying 5 U.S.C. § 706(1) to suits contesting the unlawful delay of ESA listing and similar actions).

[4] The Coalition's view (at 11, 20) that the district court did not engage in *de novo* review because it did not hold an evidentiary hearing misses the point. Either the court conducted its review on the administrative record comprising the information that was before EPA at the time of each of the 54 pesticide registrations, or it improperly relied on a "new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). The latter happened in this case. EPA admittedly filed no administrative records of its pesticide registrations. *See* Fed. Opp. at 10. And, as the Coalition acknowledges, the district court based its ruling on "evidence" submitted by the parties. Coalition Opp. at 7 (citing App. 103a-109a); *see also* App. 6a (district court "allowed all parties, including the intervenors, to introduce evidence on the effects of the use of the challenged pesticides"); *id.* at 8a (summary judgment was based on the parties' "voluminous filings on the effect of various pesticides"); *id.* at 139a (relying on "scientific or competent declaratory evidence" submitted by plaintiffs).

registrations in the absence of a determination that the FIFRA prerequisites for EPA to suspend or modify a pesticide registration had been met." Fed. Opp. at 13; Pet. at 26.[5] Despite concluding (at 13) that "the Ninth Circuit misapprehended the nature of the relationship between the dictates of FIFRA and the scope of EPA's obligations under the ESA," Federal Respondents suggest that that issue, standing alone, does not warrant certiorari because Petitioners do not identify a circuit conflict on the relationship between FIFRA and the ESA. *See* Fed. Opp. at 13.

To be sure, this decision below may be the first in which a court of appeals has addressed the interplay between FIFRA and the ESA's consultation provisions.[6] But the fact

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[5] *See also* Fed. Opp. at 13 ("Because Section 7(a)(2) of the ESA . . . does not require agencies to take actions that are not authorized by their organic statutes, the district court should not have ordered injunctive relief affecting pesticide registrations in the absence of a determination that the FIFRA prerequisites for EPA to suspend or modify a pesticide registration has been met."). Thus, the Solicitor General disagrees with the Coalition's analysis (at 27-30) that the remedy is lawful. While that remedy might not directly contravene other appellate precedents on the ESA and FIFRA, the injunction conflicts with this Court's approach that a court cannot grant a remedy that is inconsistent with a comprehensive remedial scheme enacted by Congress. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). Those "conflicts with relevant decisions of this Court" provide a strong basis for entertaining review. S. Ct. Rule 10(c).

[6] *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989), cited by the Coalition (at 28), is not germane. It involved substantive allegations that EPA's registration of strychnine constituted a "take" of endangered species in violation of ESA § 9, 16 U.S.C. § 1538, not allegations that EPA had committed procedural violations of the ESA by failing to consult under ESA § 7(a)(2). In

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